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Prostitution in India: Sex Workers, Government and the Legalization Controversy

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promulgate their common objective: legalization of the sex trade.³⁶ Indian sex workers' unions have organized protests and conventions demanding legalization of their trade³⁷ in order to prevent further exploitation by pimps and brothel keepers.³⁸ While Indian sex workers appear fervent in their battle for legalization of prostitution, an assessment of history, current legislation and governmental action suggests that India's policy concerning prostitution will remain unchanged.

In ancient India, the prostitute played an ever-changing role in society, representing both an integral component of Indian society and a heinous sexual offender.³⁹ The duality reflected therein lingers in modern culture, as prostitution

***PROSTITUTION IN INDIA: SEX
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Angela R. Carlson

In the 1990s, Indian prostitutes began joining together in an effort to

³⁶ *Prostitutes in India Set Up a Network*, BBC NEWS ONLINE, March 31, 1998, available at http://news6.thdo.bbc.co.uk/hi/english/world/s/w_asia/newsid_71000/71008.stm [hereinafter *Network*].

³⁷ Prabha Kotiswaran, *Preparing for Civil Disobedience: Indian Sex Workers and the Law*, 21 B.C. THIRD WORLD L.J. 161, 181 (2001).

³⁸ *Network*, *supra* note 1.

³⁹ See Kotiswaran, *supra* note 2, at 197.

represents both power and downfall.⁴⁰ Also in ancient India, prostitutes were placed in many "categories," depending on the prostitute's class and level of accomplishment.⁴¹

Prostitution was first penalized during British colonial rule of India, with the enactment of the Cantonment Act of 1864 and the Contagious Diseases Act of 1868.⁴² After India became independent from Britain in 1947,⁴³ however, the movement of contempt for prostitutes continued.⁴⁴

Along with various state-level public order and health laws,⁴⁵ the Immoral Traffic in Persons Prevention Act of 1986 (hereinafter "the Act") is the current legislation regulating prostitution in

India.⁴⁶ The Act is largely a carryover of the Suppression of Immoral Traffic in Women and Girls Act of 1956,⁴⁷ which was enacted pursuant to the United Nations International Convention for the Suppression in the Traffic in Persons and the Exploitation of the Prostitution of Others.⁴⁸ Under the Act, the act of sexual intercourse with a prostitute is not illegal; however, every other act required to carry out prostitution is a crime.⁴⁹ These criminalized acts include solicitation for the purpose of prostitution, maintaining brothels, living off the earnings of a prostitute, and carrying on prostitution in public places.⁵⁰ The Act permits police discretion, in that raids on brothels without a warrant need only be based on a mere belief of a violation of the Act.⁵¹

This unlimited discretion has persistently been source of frustration for Indian prostitutes, who claim the Act

⁴⁰ *Id.* at 201.

⁴¹ *Id.*

⁴² Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India*, 10 COLUM. J. GENDER & L. 333, 368 (2001).

⁴³ Vivek K. Hatti, Note, *India's Right to Reclaim Cultural and Art Treasures from Britain under International Law*, 32 GEO. WASH. J. INT'L L. & ECON. 465 (2000).

⁴⁴ Kotiswaran, *supra* note 2, at 219.

⁴⁵ *Id.* at 167.

⁴⁶ *Id.* (citing 27 INDIA A.I.R. MANUAL 496).

⁴⁷ *Id.*

⁴⁸ Kapur, *supra* note 7, at 359.

⁴⁹ Kotiswaran, *supra* note 2, at 167.

⁵⁰ *Id.* at 168.

⁵¹ *Id.*

permits police harassment of prostitutes.⁵² Prostitutes also allege there is disproportionate enforcement of the Act against prostitutes in general, rather than against brothel-keepers and pimps.⁵³ Further, prostitutes criticize the nonexistence of punishment for clients under the Act.⁵⁴

In 1994, the National Law School of India University's drafting of various prostitution reform proposals resulted in the Conference on Women and the Law.⁵⁵ One proposal, the Sex Worker (Legalization for Empowerment) Bill (hereinafter "the Bill"), suggested a complete repeal of the Act.⁵⁶ First, the Bill declared sexual services lawful and stated that sex work is a legitimate exercise of an individual's right to work.⁵⁷ Further, the Bill provided for non-discrimination measures, including a prostitute's right to refuse medical check-ups and the right to custody of her children.⁵⁸ Also, the Bill

mandated a prohibition on the abuse of prostitutes and provides for criminal penalties thereto.⁵⁹ Finally, the Bill set forth guidelines for the formation of trade unions for prostitutes.⁶⁰ The government of India has not responded to any of the Bill's numerous proposals.⁶¹

In their continuous battle for the legalization of prostitution, Indian prostitutes have found strength in the formation of sex workers' unions. The unions are an effective means for articulating their demands and responding to the discrimination they face.⁶² Durbar Mahila Sammanoy Samity, an Indian sex workers' union, has been at the forefront of a struggle to legalize prostitution.⁶³ Since 1996, a women's group known as the Mahila Samanyaya Committee has also organized various Indian sex workers

⁵² *Network*, *supra* note 1.

⁵³ Kotiswaran, *supra* note 2, at 169.

⁵⁴ *See id.* at 168.

⁵⁵ *Id.* at 183.

⁵⁶ *Id.* at 190.

⁵⁷ *Id.* at 190-91.

⁵⁸ *Id.* at 191.

⁵⁹ *Id.*

⁶⁰ *Id.* at 192.

⁶¹ *Id.*

⁶² *Id.* at 182.

⁶³ Subir Bhaumik, *Sex Workers Demand Recognition*, BBC NEWS ONLINE, March 3, 2001, available at http://news.bbc.co.uk/hi/english/world/south_asia/newsid_1200000/1200344.stm

conferences.⁶⁴ In 1998, prostitutes set up a network to further their goals: revocation of the Act and the legalization of prostitution.⁶⁵ By some accounts, the organization of Indian sex workers is not a modern phenomenon, as reports exist of prostitute collectives as early as immediately postcolonial India.⁶⁶ Even as unionized collectives, however, prostitutes face governmental backlash, as sex trade unions do not have the benefit of trade union rights under the Trade Union Act of 1926.⁶⁷

While India's 2.3 million sex workers⁶⁸ may repeatedly seek legalization of trade, there are a number of reasons why it seems unlikely that the government will assent and change legislation

concerning prostitution. First, in India a prostitute is viewed as the "vector and transmitter" of AIDS.⁶⁹ In the early 1980s, Indian governmental officials denied that AIDS would be problematic for India due to the moral values of the Indian population.⁷⁰ Their claims, however, were quickly dispelled as reports of HIV in the Indian population quickly emerged.⁷¹ Indian officials responded with the AIDS Prevention Bill of 1989.⁷²

The AIDS Prevention Bill permitted forcible testing of high-risk groups, including prostitutes.⁷³ However, the AIDS Prevention Bill met tremendous backlash due to its discriminatory potential; thus, it was withdrawn.⁷⁴ The AIDS Prevention Bill demonstrates the Indian government's belief that prostitutes are the source of AIDS in India and, consequently, it can be conjectured that the Indian government will not legalize a

⁶⁴ Kotiswaran, *supra* note 2, at 181.

⁶⁵ *Network*, *supra* note 1.

⁶⁶ Kotiswaran, *supra* note 2, at 181.

⁶⁷ Abhinaba Chatterjee, *Trade Union Rights for Sex Workers Gains Momentum*, THE TIMES OF INDIA, March 18, 2001, available at 2001 WL 17101157.

⁶⁸ Gita Pandey, *Indian Prostitutes Reject 'Beggar' Status*, BBC NEWS ONLINE, January 25, 2001, available at http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1135000/1135628.

⁶⁹ Ratna Kapur, *Law and the Sexual Subaltern: A Comparative Perspective*, 48 CLEV. ST. L. REV. 15, 20 (2000).

⁷⁰ Kapur, *supra* note 7, at 358.

⁷¹ Kotiswaran, *supra* note 2, at 174.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

trade it views as the evil source of the deadly epidemic. It is notable, however, that a member of the Trinamul Congress, an Indian political party, has advocated the legalization of prostitution to prevent the spread of AIDS, asserting, "This profession should be legalized as it would enable government intervention and ensure strict vigil on the spread of HIV."⁷⁵

Also, the Indian police have rejected the cries for the legalization of prostitution, as they believe that the legalization would result in more children being drawn into the sex trade.⁷⁶ While the connection may be questionable, the concern is valid, as an estimated 200 young girls enter the "flesh trade" every day in India.⁷⁷

Further, the Indian government recently made clear its opinion on prostitution as a trade when it categorized prostitutes with beggars and vagabonds for census purposes.⁷⁸ The census commission noted that the government does not recognize prostitution as an economic activity, as it is illegal and, therefore, prostitutes will be classified with all those who have an unidentified source of income.⁷⁹

While Indian sex workers will continue to unionize, protest and prostitute, the Indian government appears steadfast in its rejection of legalized prostitution. A glimmer of hope may remain for advocates of legalized prostitution in India, however, as countries, including Bangladesh,⁸⁰ legalize the sex trade.

⁷⁵ Chatterjee, *supra* note 32 (quoting Arunava Ghosh, senior advocate of the Calcutta High Court and Dum Dum zonal committee of Trinamul Congress).

⁷⁶ *Indian Prostitutes Rally Against Exploitation*, BBC NEWS ONLINE, November 14, 1997, available at http://news6.thdo.bbc.co.uk/hi/english/world/south_asia/newsid_31000/31490.stm.

⁷⁷ See Priyanka Tikoo, *Estimated 200 Girls Enter Flesh Trade Every Day*, PRESS TRUST OF INDIA LIMITED,

August 26, 2001, available at 2001 WL 25502908.

⁷⁸ Pandey, *supra* note 33.

⁷⁹ *Id.*

⁸⁰ BBC NEWS ONLINE, *Bangladesh Says Prostitution Legal*, March 14, 2000, available at http://news.bbc.co.uk/hi/english/world/south_asia/newsid_677000/677280.stm.